

BEFORE THE ELECTION COMMISSION OF PAKISTAN

PRESENT:

MR. NISAR AHMED DURRANI, MEMBER
MR. SHAH MOHAMMAD JATOI, MEMBER
MR. BABAR HASSAN BHARWANA, MEMBER
MR. JUSTICE (R) IKRAM ULLAH KHAN, MEMBER

Case No. 4 (2)/2018-MCO

In ref: **OBJECTION APPLICATION**

IN

In Ref: **USE OF INTEMPERATE LANGUAGE AND CONTEMPTUOUS
REMARKS AGAINST ELECTION COMMISSION OF PAKISTAN**

ON NOTICE:

Fawad Ahmed, s/o Chaudhary Naseem Hussain, r/o

- 1) Village and Post Office Ladhar, District Jhelum; &
- 2) H. No. 13-A, St No. 8, F-7/3, Islamabad

... Respondent

For the Respondent: Mr. Faisal Fareed, Chaudhry. ASC
Date of Hearing : 05.06.2023

ORDER

Mr. Nisar Ahmed Durrani, Member.- Facts giving rise to instant matter before us are that respondent (alleged contemnor) during press conference/public gatherings on 11.05.2022, 16.05.2022, 29.06.2022, 19.07.2022, 20.07.2022 and 07.08.2022 at different times and venues, passed derogatory and contemptuous remarks against Election Commission of Pakistan and used intemperate and insulting language. That those derogatory, scandalous, defamatory remarks and accusations were aired on leading TV Channels and also were published in print media. On such remarks, notice was issued to the respondent (alleged contemnor) on 19.08.2022 and transcripts containing the remarks were also annexed with the notice. In response thereof, reply was filed by respondent on 12.09.2022. On consideration by the Commission, the reply of



respondent was found unsatisfactory as the respondent failed to justify his position therein to discharge the notice and drop preceding, therefore, Show Cause Notice was issued to respondent on 13.09.2022 in terms of section 3 of Contempt of Court Ordinance, 2003 while exercising powers under section 10 of the Elections Act, 2017 read with rule 4 of the Elections Rules, 2017.

2. Respondent assailed the matter before Hon'ble Lahore High Court Lahore Rawalpindi Bench through W.P. No. 2285 of 2022. Hon'ble High Court on 30.08.2022 had passed the order *inter alia* with the following observations:

"9.....As Interim relief has already been granted by the High Court of Sindh, Karachi in identical matter, referred to above, therefore, to maintain consistency, the proceedings before the ECP may continue however, final order shall not be passed."

Respondent before also assailed the Show Cause Notice through W.P. No. 2605/2022 before Hon'ble High Court Rawalpindi Bench. Hon'ble High Court passed the order on 21.09.2022 *inter alia* with the following observations:

".....therefore, it is directed that the proceedings may continue but no final order shall be passed till outcome of the writ petition and in the meanwhile, no adverse action shall be taken against the Petitioner under grab of the impugned notice, till the next date of hearing."

In the meanwhile respondent filed an objection application before Election Commission of Pakistan on 24.01.2023 and prayed as under:



"In the light of afore mentioned submissions it is respectfully prayed that the instant application may very kindly be allowed in terms of submission made herein above."

Election Commission of Pakistan assailed the interim orders of Hon'ble Lahore High Court Lahore Rawalpindi Bench dated 30.08.2022 and 21.09.2022 passed in W.P. No. 2285 of 2022 and in W.P. Nos 2604 & 2605 of 2022, respectively as well as order of Hon'ble Sindh High Court dated 29.08.2022 passed in CM No. 2217/2022 in Const. Petition No. D-4977 of 2022 in connected matter of Asad Umar before august Supreme Court of Pakistan through CPs Nos. 3679, 3680, 3681 and 3682 of 2022. The august Supreme Court of Pakistan disposed of the petitions on 06.12.2022 with the following observations:

"3. It is apparent that the impugned orders by the High Courts have not restrained the petitioners ECP from proceedings in the matters initiated by it under section 10 of the Act. The learned counsels for the respondents, who were present in the Court for an another case, have assisted us in the matter. They have drawn our attention to the statement made by the respondent before the ECP that affirms that the latter has not been restrained from proceeding ahead in the pending contempt matters. The said learned counsel however, inform that they have raised objection before the ECP, inter alia, about the alleged incompetence of its officer who had issued the show cause notices. As these objections have been raised in the pending proceedings under section 10 ibid before the ECP, the same are required to be



considered and decided by it before passing any final order. We hold that the petitioner-ECP may continue its proceedings, by in accordance with law including, by decision on the objections raised on behalf of the respondents."

It was further observed as under:

"5. In view of the foregoing legal position, the proceedings before the ECP under section 10 of the Act may continue without restraint. These petitions are disposed of with the above observations."

3. Certainly, ECP had to decide the objection application filed by the respondent but delay so occasioned was due to the reason that the respondent had challenged the Notice and Show Cause before Hon'ble Sindh High Court. It reveals from order sheets dated 18.04.2023, 16.05.2023 and 23.05.2023 that matter was particularly fixed for arguments on objection applications but adjournments were sought on various pretexts. However, learned counsel for respondent has advanced his arguments on objection application today.

Arguments of Mr. Anwar Mansoor Khan, ASC in Asad Umars' Case

4. He vociferously contended that Election Commission of Pakistan has no jurisdiction to issue notices in the subject matter under section 10 of the Election of the Elections Act, 2017 read with Contempt of Court Ordinance, 2003. He further emphasized that Show Cause Notice dated 13.09.2023 issued by the Director General (Law) of ECP is contrary to law as he lacks the authority. Thirdly, he contended that under the Contempt of Court

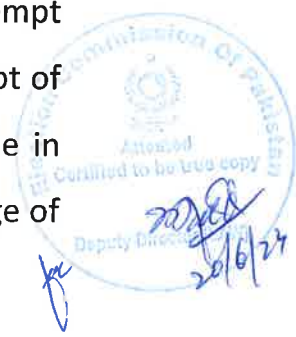


Ordinance, 2003, Member whose contempt is allegedly committed is barred to sit in the Bench in his own cause.

5. He while augmenting his arguments referred to sub rule 7 of rule 4 of the Elections Rules, 2017 and contended that Commissioner shall nominate a Member to consider the feasibility in contempt matters. He further stated that particularly and clearly, the word "Member" is used in above referred sub-rule and no officer could exercise, the powers of the Member. He further emphasized that word "or" is used which will be read separately from the first part of the sentence. He emphatically contended that this is the crucial principle, laid down in the above sub rule which gives the authority to the "Member" instead of "Officer" to consider the matter or further taking action, which is lacking in the instant matter. He vociferously contended that in view of an unambiguous language of above referred rule ibid, neither Secretary, Election Commission nor Direction General (Law) was authorized to issue Show Cause Notice to an alleged contemnor.

6. Coming to the second point of his objection, he contended that for an applicability of contempt proceedings, Section 10 of the Elections Act, 2017 will be read together with section 17 of Contempt of Court Ordinance, 2003. He contended that notice in the instant matter comes within the definition of "Judicial contempt" of section 2 (c) of Contempt Ordinance, 2003. That under section 11 (3) of the Contempt of Court Ordinance, 2003 Election Commission of Pakistan cannot even hear the contempt matter. He further emphasized that section 19 of the Contempt of Court Ordinance gives the right to appeal which is appealable in the manner that in the case of an order passed by a Single judge of

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a High Court an intra court appeal shall lie to a bench of two or more judges; that in a case in which the original order has been passed by a division or larger bench of a High Court an appeal shall lie to the Supreme Court; that in the case of an original order passed by a Single Judge or a bench of two judges of the Supreme Court, an intra Court appeal shall lie to a bench of three Judges and in case the original order was passed by a bench of three or more judges an intra court appeal shall lie to a bench of five or more judges. That the Appellate court may suspend the impugned order pending disposal of the appeal. He emphatically contended that in the instant matter where the Appeal will be filed against the order of ECP.

7. He further contended that under Article 204 of the Constitution of Islamic Republic of Pakistan, Election Commission of Pakistan could not exercise jurisdiction which is specially conferred on High Court or Supreme Court, as in Article 204, very specifically High Court and august Supreme Court of Pakistan are mentioned, who may only initiate contempt proceedings. That Article 175 (1) further gives the detail of establishment and jurisdiction of courts which provides that there shall be a Supreme Court of Pakistan, a High Court for each Province, and Islamabad High Court. That Article 175A of the Constitution deals with the appointment of judges of Supreme Court and High Court. That in Article 218 of the Constitution, defining the composition of Commission, word "Member" is used by legislature and not the "Judge". Carrying forward his arguments contended that Contempt of Court Ordinance, 2003 only contemplates contempt proceedings committed in respect of "Court" including certain

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acts relating to a "Judge"; that contempt of Court Ordinance, 2003 only deals with the power of a "Supreme Court and High Courts to punish for contempt; the right of appeal provided in section 19 of the Contempt of Court Ordinance, would be only assailed if the original order is rendered by a court. Last limb of his arguments was that there should have been a written order of the Commission for issuance of Show Cause Notice to the respondent which is lacking and notice to Advocate General has also not been issued. He placed his reliance on reported judgments; i) (PLD 2018 SC 198) Muhammad Hanif Abbasi vs Imran Khan Niazi and others; (ii) (2015 SCMR 1303) Dr. Raja Aaja Aamer Zaman vs Omar Ayub Khan & others (iii) (PLD 2019 Sindh 624) Messers Muslim Commercial Bank Ltd. Vs Federation of Pakistan and 2 others (iv) (PLD 1996 SC 42) The State versus Khawaja Masood Regional Director, Pakistan Narcotics Control Board, Lahore and 3 others (v) (PLD 2010 SC 806) Justice Hasnat Ahmed Khan and 3 others vs Registrar Supreme Court of Pakistan and others (vi) (PLD 2001 SC 142) Shafaatullah Qureshi vs Federation of Pakistan (vi) (PLD 2013 SC 501) Sh. Riaz-ul-Haq and another vs Federation of Pakistan through Ministry of law and others.

8. Mr. Faisal Fareed Ch. ASC, learned counsel for respondent adopted the arguments of Mr. Anwar Mansoor Khan, Senior ASC. However, he added that ECP can decide the question of jurisdiction of section 10 of the Elections Act, 2017. Contended that in the presence of Article 204 of the Constitution, no other law can be applied. That Section 10 of the Elections Act, 2017 and rule 4 of Elections Rules, 2017 do not empower the Secretary ECP or DG Law to issue notices or Show Cause Notices. That Show



Cause Notice has to be issued by the Commission. He also emphatically contended that at least, there should have been a written order of the Commission for issuance of Show Cause Notice. He further contended that Article 204, containing powers of contempt is enshrined in Chapter-VII while composition of Commission as well as powers of Commission are given in Chapter-VIII, therefore, it is sufficient to hold ECP cannot use powers under Article 204 of Chapter VII.

9. Director General (Law) put his appearance and argued that Election Commission of Pakistan has vast powers to adjudicate upon the matter. He contended that under Article 220 of the Constitution of Islamic Republic of Pakistan, 1973 all executive authorities in the Federation and in the Provinces are duty bound to assist the Commission in discharge of his functions. He further contended that Notice and Show Cause Notice dated 13.09.2022 were issued to respondent by the orders of the Commission. That Election Commission of Pakistan can also adjudicate upon the matter under Article 218 (3) of the Constitution, which was further elaborated by august Supreme Court of Pakistan in renowned judgment (PLD 2012 SC 681) Workers Party Pakistan vs. Federation of Pakistan and 2 others. He further contends that under section 10 of the Elections Act, 2017 Election Commission has been invested with the powers to take cognizance of its contempt in the same mode and manner to proceed with the matters of Contempt as conferred upon High Court itself or by an application by any person.

10. Mr. Khurram Shahzad, ADG (Law) while appraising the Commission contended that while dealing with the contempt



matters, Article 175 (2) and Article 213 (3) of the Constitution shall be read together. He further emphatically contended that Article 204 of the Constitution is enable Article and not restrictive Article. Further contended that august Supreme Court of Pakistan has particularly defined the powers of Election Commission in Workers' Party case. He referred paragraph 44 of the said judgment. He further contended that under proviso of Article 222 of the Constitution, no any law shall have effect to take away the powers of Election Commission. He further contended that Article 213 (3) of the Constitution vests the powers to Election Commission of Pakistan in the manner that the Commissioner or Commission shall have such powers and functions as conferred on him by the Constitution and law. He emphasized that Elections Act, 2017 (existing law) was passed by the Parliament whereby under section 10 of the Act *ibid*, Election Commission was empowered to punish for its contempt. He contended that section 10 of the Act *ibid* cannot be read in isolation. That Article 213 (3) of the Constitution and section 10 of the Elections Act, 2017 shall be read together. That Article 218 (3) of the Constitution assigned the duty to conduct the elections, honestly, justly, fairly, therefore, there should have been power to carry out the true spirit of said Article which have been given so through section 10 of the Act *ibid*. He argued that Article 220, 218 (3), 222 (proviso) and 213 (3) of the Constitution shall be read with section 10 of Act *ibid* together.

11. We have heard the arguments and carefully perused the record. We would discuss the matter in the light of the arguments advanced by learned counsel for the respondent. Section 10 of the Elections Act, 2017 is reproduced for convenience as:

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Commission Of Pakistan

"10. Power to punish for contempt.—The Commission may exercise the same power as the High Court to punish any person for contempt of court and the Contempt of Court Ordinance, 2003 (V of 2003), or any other law pertaining to contempt of court shall have effect accordingly as if reference therein to a "court"|| and to a "judge"|| were a reference, respectively, to the "Commission"|| and the "Commissioner"|| or, as the case may be, a member of the Commission."

Above quoted section 10 consists of two different parts. First vesting the power of contempt to Commission and second provides the regulatory procedure. The powers once given to the Commission, those cannot be curtailed under Article 222 of the Constitution. The powers and functions so vested are further prescribed in Article 219 (e) of the Constitution of Islamic Republic of Pakistan, 1973. Plain reading of above section reveals that the Commission is vested with the same powers of contempt as are vested in a High Court under Article 204 of the Constitution of Islamic Republic of Pakistan. Certainly, the power is to be exercised under Article 204 of the Constitution. The question which arises, as raised by the learned counsel that Commission may not exercise the powers of contempt as these powers under Article 204 of the constitution only relates to High Court and Supreme Court. The august Supreme Court of Pakistan in case (PLD 1996 SC 42) The State vs. Khalid Masood has observed as under:

"Indeed in the above-quoted clause (3), it has been provided that the exercise of the power conferred on a Court by this Article may be regulated by law and subject to law by rules made by the court, but, in my view, it does not



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mean that statute can control or curtail the power conferred on the superior Courts by this Article, nor it means that in the absence of a statute on the above subject, the above Article will be inoperative."

In another case (PLD 2012 SC 923) Baz Muhammad Kakar and others Vs Federation of Pakistan august Supreme Court of Pakistan has observed as under:

"16 (xxii) As per preamble of the legislation under scrutiny it has been framed in exercise of powers conferred by clause (3) of Article 204 of the Constitution, which provides that exercise of the power conferred on a Court by this Article may be regulated by law and subject to law by rules made by the Court, but it does not mean that statute can control or curtail the powers conferred on the superior courts by the said Article, nor does it mean that in the absence of a statute on the above subject, the above Article would be inoperative."

12. The above said verdicts of the august Supreme Court of Pakistan are referred to in order only to emphasize that once a power is vested in a forum, it cannot be taken away.

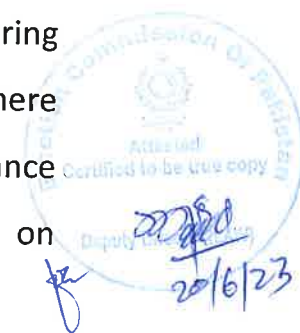
13. Without prejudice to above, legislatures have empowered Election Commission of Pakistan to make rules under section 239 of Elections Act, which were made so, called "the Elections Rules, 2017. The purpose behind empowering ECP in our mind is to carry out the purpose of the Elections Act, 2017. There is nothing available on record or brought before us that these rules had been challenged at any appropriate forum. Thus the powers are to be exercised under the Rules, 2017. Rule 4 of the Elections Rules, 2017 relates to procedure of contempt of the Commission. Sub

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rule (1) of rule 4 says that the Commission may take cognizance of its alleged contempt under section 10 of the Elections Act, 2017 either suo moto or on a petition filed by any person on account of willful disobedience of any order, instruction or direction of the Commission or a breach of undertaking submitted to the Commission or using intemperate language against the Commissioner, or the Commission or any of its members. Sub-rule 9 of rule 4, states that the respondent shall, on the first hearing, file a written reply in answer to the allegations against him shall be afforded reasonable opportunity to adduce evidence. It is also striking feature of the case that prior to promulgation of Elections Act, 2017, under section 103A Representation of People Act, 1976 Commission was vested with the same powers of contempt as vested under section 10 of the Elections Act, 2010. The question which arises is that if the legislatures had any different intention about taking away or abridging the power of contempt, section 10 had not been inserted in Elections Act, 2017. However, it was never done so. In such view of the matter, jurisdiction of contempt under section 10 of the Act *ibid* is not ultra vires the Constitution.

14. Now comes to the second objection that Secretary and DG (Law) were not authorized to issue notice and Show Cause Notice respectively. This argument bears no weight due to two reasons. Firstly, that Notice dated 19.08.2022 was issued by the Secretary Election Commission of Pakistan with the prior formal approval of the Commission. Secondly, learned counsel for respondent during the course of arguments, emphatically contended that there should have been a written order of the Commission for issuance of Show Cause. However, it reveals from record that on

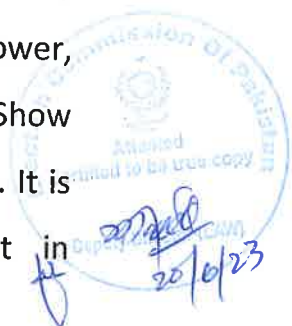


12.09.2022 an order was passed by the Commission (four Members Bench) for issuance of Show Cause Notice to respondent. The relevant segment of order is reproduced as under:

2. We have heard the Learned Counsel and considered the reply so filed on behalf of respondent. The reply does not demonstrate feeling of self approach, clarification, regret by respondent and have not found it satisfactory and does not justify to discharge the notice and drop the present contempt proceedings.

3. Let Show Cause Notice be issued to the respondent as to why contempt proceedings shall not be initiated in term of Section 10 of the Elections Act, 2017 read with Elections Rules and Section 3 of the Contempt of Court Ordinance, 2003 and he shall appear in person before the Commission on 27.09.2022 and in the meanwhile, Notice be also issued to Advocate General of Pakistan in the matter."

In pursuance of above order, Show Cause Notice dated 13.09.2022 was communicated by the Director General (Law) wherein it is particularly mentioned in the last paragraph: "By the Order of the Election Commission of Pakistan". It is also matter of record that notice was also issued to Advocate General Islamabad on 26.08.2022 bearing No. 4 (2)/2018-MCO. Even otherwise, under section 6 (1) of the Elections Act, 2017, the Commission may authorize any of the officer of the Commission to exercise power, as done so in the instant matter for issuance of Notice and Show Cause Notice by the Secretary ECP and DG(Law), respectively. It is worth mentioning here that now through amendment in



substituted sub-rule (8) of rule 4 of Elections Rules, 2017, on the direction of Election Commission, Secretary Election Commission or in case of absence of Secretary, any other officer of the Commission may also issue notice or show cause notice to alleged contemnor.

15. So far as the objection of learned counsel qua sitting of a Member whose contempt is allegedly committed is barred to sit in the Bench in his own cause is concerned, it is matter of record that in the instant matter, contempt is allegedly committed of whole Commission including "Commissioner" and "all Members" of the Commission. It is meticulously recalled that as per record obtained from PEMRA, during press conference, strongly derogatory remarks were passed by respondent and intemperate language was used as well against the Commissioner and the Commission on 11.05.2022, 16.05.2022, 29.06.2022, 19.07.2022, 20.07.2022 and 07.08.2022. Reference is made to the transcripts annexed at page Nos. 25 to 37 of file. Whether the Commission may sit as silent spectator when the power is vested to ensure its independence? The straightaway answer comes in negative that too when the latitude was also provided to avoid the contempt proceedings till it became unavoidable.

16. It is further observed that in case of difference of opinion among members of the Bench, the matter is required to be placed before full Commission under sub section (4) of section 6 of the Elections Act, 2017. Even otherwise, order of the Commission in Contempt, might be challenged at appropriate forum under the law.

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17. For what has been discussed above, the objection application of respondent is hereby turned down, by holding that the Commission has all the vested powers of taking cognizance of its contempt.


(Nisar Ahmed Durrani)

Member


(Shah Muhammad Jatoi)

Member


(Babar Hassan Bharwana)

Member


(Justice (R) Ikram Ullah Khan)

Member

Islamabad

The 20th June, 2023

